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**ATTORNEYS FOR PLAINTIFF & THE CLASS**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

GERALD HESTER, on behalf of himself  
and all others similarly situated,

Plaintiff,

v.

VISION AIRLINES, INC.,

Defendant.

Case No.: 2:09-CV-00117-RLH-RJJ

**THE CLASS'S RESPONSE IN OPPOSITION TO VISION'S OBJECTION TO THE  
ORDER OF MAGISTRATE JUDGE ENTERED ON SEPTEMBER 9, 2010,  
GRANTING THE CLASS'S RENEWED MOTION TO COMPEL**

Plaintiff Gerald Hester and the Class hereby file the Class's Response in Opposition to Vision's Objection to the Order of Magistrate Judge Entered on September 9, 2010 ("Objection") [D.E. 158]. The Class filed the Renewed Motion to Compel ("Renewed Motion") [D.E. 93] on January 20, 2010, after Vision refused to produce the documents that it agreed to produce to the Class, unredacted and in native format. That agreement is reflected in letters from Class counsel

1 dated November 20, 2009, and December 21, 2009. The Class on April 9, 2010, supplemented  
2 the Renewed Motion with the Supplement in Support of its Renewed Motion to Compel  
3 (“Supplement”) [D.E. 106]. The record demonstrates that Vision has not engaged in a good faith  
4 search for and production of documents, even after the Class significantly narrowed the scope of  
5 those requests. Therefore, the Court should affirm the Magistrate Judge’s Order granting the  
6 Class’s Renewed Motion.  
7

## 8 **I. INTRODUCTION**

9 Magistrate Judge Johnston correctly granted the Class’s Renewed Motion, as Vision has  
10 failed to provide the Class with all of the documents that it agreed to produce.

- 11 • Vision falsely claims that the only outstanding discovery is three weeks of missing flight  
12 logs. [D.E. 158 at 5.] Instead, the Class is missing, among other things, all of the Air  
13 Bridge Program flight logs for 2010, at least 24 written modifications to the McNeil  
14 Technologies, Inc. (“McNeil”) contract (Deposition of David Meers, attached as Ex. 1, at  
15 417), communications and e-mails relating to the McNeil Phase of the Air Bridge  
16 Program, Vision’s Aircraft Quote that it submitted to McNeil for the McNeil Phase  
17 (which identifies hazardous duty pay for the flight deck and cabin crews on a per hour  
18 and annualized basis, attached as Ex. 2), and James Maguire’s (Vision’s former Director  
19 of Flight Operations) calculations of Vision’s 2007 pay scale (which he testified did not  
20 include hazard pay) (Deposition of James Maguire, attached as Ex. 3, 47-52, 97-98.) The  
21 Class has been unable to determine what other documents it does not have because  
22 Vision has refused to provide a qualified and properly informed Rule 30(b)(6) witness  
23 with regard to its search for and production of documents. The Class has never  
24 “acknowledged that the remaining items which had not been produced were limited to  
25 less than three weeks of flight logs.” (*Compare* D.E. 158 at 5, *with* Letter from David  
26 Buckner to Harold Gewerter, dated Feb. 2, 2010, attached as Ex. 4; Letter from David  
27  
28

1 Buckner to Harold Gewerter, dated March 12, 2010, attached as Ex. 5; Letter from David  
2 Buckner to Harold Gewerter, dated March 25, 2010, attached as Ex. 6; e-mail from David  
3 Buckner to Harold Gewerter, dated Aug. 26, 2010, attached as Ex. 7; Letter from David  
4 Buckner to Harold Gewerter, dated Sept. 9, 2010, attached as Ex. 8.)

- 5  
6 • Vision fails to inform the Court that it has redacted all of the pertinent financial  
7 information from the McNeil and Capital Aviation contracts, much of the financial  
8 information from the limited invoices (redacted August 26, 2006 Vision Invoice, attached  
9 as Ex. 9) that it did produce to the Class, and nearly all of the financial information from  
10 the Price Basis for the Air Bridge Program that Vision submitted to McNeil for the  
11 McNeil Phase (Vision's redacted Price Basis to McNeil, attached as Ex. 10).
- 12  
13 • Vision has also unilaterally redacted documents relating to Phases II and III of the Air  
14 Bridge Program, including the amounts Vision billed for hazard pay. (*See* Ex. 9.)  
15 Furthermore, Vision has waived its claim to any privilege that these redactions may be  
16 based on because it has failed to provide the Class with a privilege log. *See Burlington*  
17 *Northern & Santa Fe Railway Co. v. U.S. Dist. Co. for the Dist. of Mont.*, 408 F.3d 1142,  
18 1147 (9th Cir. 2005).
- 19  
20 • Vision claims that it produced an e-mail regarding Vision's failure to pay over the  
21 hazardous duty pay that it collected on behalf of the Air Bridge Program employees.  
22 [D.E. 158 at 15.] However, this again is simply not true. Instead, the Class obtained this  
23 document through a third party subpoena. (*See* E-mail from Daniel Carson to William  
24 Vigil, attached as Ex. 11); (Subpoena of Daniel Carson, attached as Ex. 12.) That email  
25 (attached as Ex. 11), between Vision's Director of Flight Operations, Daniel D. Carson,  
26 and CSC's Program Manager, William Vigil ("Vigil"), states:  
27  
28

Carson (Vision): Question: we are not and have not paid any hz duty pay. What is our exposure in audit or contract obligations

Vigil (CSC): Are you kidding me? We have been charged Hazardous duty pay throughout the program, Phase 3 alone would be in excess of \$1.25 million. This has to be addressed immediately as it could be a disaster, either retroactive or refunded.

## II. RELEVANT FACTS

Vision cuts and pastes the unsupported allegations from several of its other pleadings into this one in an attempt to continue arguing what it feels are the merits of this case, but those allegations have no bearing on its abject failure to conduct a good faith search for responsive documents, as it had previously agreed, and its affirmatively bad-faith redactions of documents with no support in law. Rather, Vision is attempting to divert the Court's attention from its bad-faith conduct, and the Class will not waste the Court's time arguing the merits of the case, as they are more than adequately addressed in the Class' Motion for Summary Judgment [D.E. 135] and substantiated by the records the Class has been required to obtain from third-parties in this case, which the Class incorporates herein by reference. The central question here is whether Vision complied with its discovery obligations. It did not, despite repeated demands by the Class.

Nor will the Class rehash the whole history of Vision's discovery abuses.<sup>1</sup> For present purposes, and given that the time before trial is quite short, the relevant history begins with Vision's late 2009 agreement with the Class, embodied in the Class' letters of November 20, 2009, and December 21, 2009, to produce certain categories of documents.<sup>2</sup> The parties held a number of conferences in late 2009 regarding Vision's production of documents. In order to expedite Vision's production, counsel for the Class agreed to hold a number of the Class's

<sup>1</sup> Vision's abusive discovery tactics are well-documented. (*See, e.g.*, [D.E. 49, 50, 54, 56, 60, 61, 64, 93, 96, 99, 106, 110, 117.].)

<sup>2</sup> The entire history of discovery in this matter, at least through March 2010, is set forth in the Renewed Motion [D.E. 93] and the Supplement [D.E. 106], which the Class incorporates by reference.

1 requests in abeyance and to significantly narrow its remaining requests for production of  
 2 documents. Counsel for Vision and Class counsel discussed each request and how each request  
 3 could be narrowed, and the parties ultimately agreed on a series of narrowed requests  
 4 (“Narrowed Requests”), which are memorialized, along with Vision’s agreement, in letters dated  
 5 November 20, 2009, and December 21, 2009. (*See* Letter from David Buckner to Harold  
 6 Gewerter dated November 20, 2009, attached as Ex. 13); (Letter from David Buckner to Harold  
 7 Gewerter dated December 21, 2009, attached as Ex. 14.)<sup>3</sup>

9 Specifically, Vision agreed that it would produce all documents responsive to Narrowed  
 10 Requests 1, 2, 3, 8, 9, 10, 11, 12, and 15. (*See* December 21, 2009 letter, Ex. 14.) Counsel for  
 11 Vision also agreed to produce Vision’s documents responsive to the Narrowed Requests on a  
 12 rolling basis, and that Vision would complete its production by no later than January 7, 2010.  
 13 (*See id.*) As set forth in the Renewed Motion [D.E. 93], Vision produced nothing by that date,  
 14 and the documents that it produced after that date are neither complete nor fully responsive.  
 15 Instead, this is what Vision produced prior to the second set of Rule 30(b)(6) depositions:

- 17 • January 12, 2010 – Vision produced what it claimed was a list of all Class  
 18 members and the employment files for twenty-three Class members.
- 19 • January 15, 2010 – Vision provided Class counsel with an amended class list after  
 20 numerous deficiencies were identified by Class counsel in Vision’s purported  
 21 Class list.
- 22 • January 18, 2010 – Vision produced spreadsheets of its payroll records for the  
 23 payroll cycles from July 31, 2007 through December 31, 2009, with considerable  
 24 gaps in time and missing sheets.

27 <sup>3</sup> Vision’s verbatim recitation of Rule 26 is irrelevant. Vision agreed to produce these documents, then  
 28 did not, and now wants to argue, apparently, that it should not have agreed in the first place. It is far too  
 late for that, especially considering that the case is set for the trial calendar scheduled to begin on October  
 4, 2010.

- 1           • January 22, 2010 – Vision produced some of the Class member employee files.
- 2           However, the employee files did not include all Class members.
- 3           • March 10, 2010 – Vision re-Bates stamped and re-produced to the Class
- 4           thousands of pages of documents produced by the Class to Vision in 2009, despite
- 5           being directed by the Court that this did not constitute a good faith search and was
- 6           insufficient to satisfy its obligations. (March 2, 2010, Hearing Tr., attached as Ex.
- 7           15, at 25-27.) Vision also produced some additional documents, but many of
- 8           these were heavily redacted by Vision prior to production.<sup>4</sup>

10           Thereafter, Class counsel deposed Vision's 30(b)(6) corporate representatives, William  
 11           Acor ("Acor"), Chief Executive Officer, David Meers ("Meers"), Executive Vice President, and  
 12           Brian Daggett ("Daggett"), Air Bridge Program Manager, on March 16, 17, and 18, 2010. As  
 13           discussed at length in the Supplement, Vision's 30(b)(6) representatives were unprepared to  
 14           testify with regard to the efforts Vision undertook to search for and produce documents  
 15           responsive to the Class's Narrowed Requests, even though this topic was clearly identified in the  
 16           Class's Notice. (Plaintiff's Notice of 30(b)(6) Deposition, attached as Ex. 16.) Specifically,  
 17           topic eight in the Class's Notice stated:

19           Vision's efforts and procedures relating to or undertaken in the course of  
 20           responding to document requests in this litigation, including: (a) the identities of  
 21           all individuals from whom documents were requested and/or collected, as well as  
 22           the identities of individuals who may be in possession of documents but from  
 23           whom such documents have not yet been collected, (b) the locations from which  
 24           documents were collected, and the locations from which documents have not yet  
 25           been collected, (c) the decisions concerning whom to ask for documents and  
 26           where to look for documents, (d) the review by attorneys, employees, or agents  
 27           undertaken in determining the responsiveness of individual documents, (e) the  
 28           internal monitoring of compliance with document requests, and (f) the physical  
 production of documents and things.

<sup>4</sup> Vision produced some additional flight logs and payroll data after the 30(b)(6) depositions in small amounts, but no other documents. Further, the flight logs Vision produced for 2010 relate to its flights to Cuba, and not the Air Bridge Program. This fact has been brought to Vision's attention, but Vision has done nothing to cure this problem.

1 Furthermore, topic ten stated, "Vision's efforts and procedures relating to and undertaken in the  
2 course of collecting documents in response to Plaintiff's document requests." Vision's 30(b)(6)  
3 witnesses, however, could only testify as to what action they took in their individual capacities to  
4 gather responsive documents.  
5

6 This, however, is not the first time Vision produced unprepared 30(b)(6) corporate  
7 representatives to testify in this litigation. Vision produced two unprepared 30(b)(6)  
8 representatives for deposition on September 11, 2009, who were unable to testify about what  
9 efforts Vision undertook to search for and produce responsive documents. After putting up five  
10 different 30(b)(6) corporate representatives, Vision has still failed to produce a witness capable  
11 of testifying on this subject, despite Vision's affirmative duty to adequately prepare and educate  
12 its 30(b)(6) witnesses to testify knowledgably on the topics identified in the Class's Notice. This  
13 failure to adequately educate its 30(b)(6) witnesses on these topics constitutes a failure to appear  
14 and is itself sanctionable under Fed. R. Civ. P. 37(d). *See Black Horse Lane Assoc., L.P. v. Dow*  
15 *Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) (affirming monetary sanction).  
16

### 17 **III. ARGUMENT**

18 Despite Vision's failure to produce appropriate witnesses, what has become  
19 overwhelmingly clear in the depositions of Meers, Acor, Daggett, and Maguire is that Vision has  
20 not engaged in a good faith effort to gather and produce documents responsive to the Narrowed  
21 Requests. In particular, Vision's corporate representatives confirmed, as set forth in the  
22 Renewed Motion, that: (1) there are additional documents responsive to the Class's Narrowed  
23 Requests that Vision withheld and failed to produce; (2) Vision unilaterally redacted pertinent  
24 information, without any basis in privilege, from its documents, even though the Court has  
25 entered a protective order [D.E. 34] in this case; and (3) Vision and its personnel may have  
26 deleted, lost, or otherwise failed to preserve relevant documents. The Magistrate Judge has  
27  
28



1 properly ordered Vision to comply with its discovery obligations [D.E. 152], and his Order  
2 should be affirmed by the Court.

3 *1. Vision Has Failed To Search For And Produce All Responsive Documents*

4 Vision's 30(b)(6) witnesses confirmed that Vision has documents responsive to the  
5 Class's Narrowed Requests that it has not produced in this litigation. In particular, Vision has  
6 not produced all of the modifications to its contract with McNeil, and has not produced its bid  
7 proposals or any of the communications surrounding its bid for the Air Bridge Program Contract  
8 that it provided to McNeil. Furthermore, Vision has not produced a single communication  
9 between it and McNeil that relates to the Air Bridge Program Contract, even though Vision's  
10 30(b)(6) witnesses have testified to the existence of such documents and communications.

11  
12 Vision failed to produce to the Class all of the modifications to its contract with McNeil.  
13 Specifically, Narrowed Request No. 2 states, "Vision has previously agreed to provide us with  
14 all contracts between or among any of Vision, Capital Aviation, CSC, and McNeil that relate to  
15 the Airbridge program, including any modifications and addendums to those contracts." (Dec.  
16 21, 2009 letter, Ex. 14.) With respect to its contract with McNeil, Vision produced only a  
17 redacted version of the McNeil contract with no addenda or modifications. However, Meers  
18 testified that there were at least "22 or 24" modifications to the McNeil contract (Meers Dep.,  
19 Ex. 1, at 417), and that those modifications are currently in Vision's possession (*id.* at 418).  
20 Meers went on to testify that the McNeil contract is "an incrementally funded contract . . . [s]o  
21 it's been modified a number of times to increase funding." (*Id.* at 417.) These funding  
22 modifications are significant because each time the overall funding of the McNeil contract is  
23 increased the amount of the individual line items also increase, one of which is for hazard pay for  
24 Vision's employees. (See Ex. 2, Vision's Aircraft Quote to McNeil, which was obtained through  
25 a litigated subpoena served on McNeil.) Even though Vision agreed to produce these documents  
26 it has failed to provide them to the Class.  
27  
28



1 Furthermore, Meers testified that Vision submitted bid proposals to McNeil which it has  
2 failed to produce to the Class. Vision previously agreed in Narrowed Request No. 3 to “provide  
3 us with any bids or proposals that relate to any or all of the contracts between or among any of  
4 Vision, Capital Aviation, CSC, or McNeil for the Airbridge Program.” (Dec. 21, 2009 letter, Ex.  
5 14.) Meers stated that Vision prepared at least one, if not more, bid proposals that it submitted  
6 to McNeil for the Air Bridge Program Contract. (Meers Dep., Ex. 1. at 420.) Moreover, Meers  
7 testified that there were communications between McNeil and Vision that related to Vision’s bid  
8 proposal for the Air Bridge Program Contract. (*Id.*) Despite promising to provide the Class with  
9 these documents, Vision has failed to produce them. An example of one of those documents  
10 Vision submitted to McNeil, which the Class obtained from McNeil, identifies amounts of  
11 hazard pay for the Air Bridge Program employees on a per hour and annualized basis. (*See* Exs.  
12 2, 17.)

13  
14 In the affidavit that McNeil provided to the Class as a result of the Class’s litigation  
15 efforts in the Eastern District of Virginia, Vigil, McNeil’s Vice President of Aviation Services,  
16 notes that Vision “submitted an ‘Aircraft Quote’ for the services it provides under the  
17 Subcontract” with McNeil. Vigil explains that the Aircraft Quote “contained certain Cost  
18 Elements, which include but are not limited to flight deck crew salary, flight deck crew benefits,  
19 flight deck crew hazardous duty bonus, cabin crew salary, cabin crew benefits, and cabin crew  
20 hazardous duty bonus.” (Affidavit of McNeil, attached as Ex. 17, ¶ 5.) Vision has never  
21 produced this document to the Class despite its obvious relevance. Further, Meers has stated that  
22 “[t]here had to be more than one” submission by Vision to McNeil, (Meers Dep., Ex. 1, at 420),  
23 even though the only one that Vision provided in discovery was heavily redacted. (*Id.* at 418-19)  
24 (acknowledging that Vision has a copy without blackouts).

25 Moreover, Vision made little or no effort to actually comply with its discovery  
26 obligations. Daggett testified that he was only asked to provide “payroll information, personnel  
27  
28

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files, and flight logs,” and that was all he searched for, even though he is the Air Bridge Program Manager. (Daggett Dep., Ex. 18, at 230-31.) And, despite the fact that he claims never to have received a copy of the Class’s requests for production of documents, (*id.* at 219), he nonetheless unilaterally decided that the e-mails on his computer and Blackberry were not relevant to this case. (*Id.* at 243-245.) He therefore made no effort to gather, produce, or preserve them, and could not recall being instructed by counsel or anyone else that he needed to do so. (*Id.*) James Maguire, Vision’s former director of flight operations, testified at his deposition on June 28, 2010, that he came up with the pay scale for flight deck and cabin crew imposed by Vision on the Air Bridge Program employees on October 1, 2007. (Maguire Dep., Ex. 3, at 46-50.) He also testified that he intentionally did not include amounts for hazard pay in that pay scale. (*Id.* at 50-51, 96-98.) Maguire stated that he did these computations on spreadsheets on his computer, which is still in his possession, and that he was willing to provide them. (*See id.* at 50.) However, he could not recall providing any of those spreadsheets in discovery, nor was he asked to copy them for or provide them to anyone (*see id.* at 48-49), and these spreadsheets have never been produced by Vision. Maguire also testified that he primarily used his Vision e-mail account to communicate with Vision’s pilots and flight crews. (*See id.* at 39-41.) It is not clear that any of these e-mails have been produced, and certainly one of the most relevant of those, from former Air Bridge Program pilot Davis Pritchard (“Pritchard”) to Maguire inquiring about hazard pay, has not been produced by Vision. (*See* Deposition of Davis Pritchard, attached as Ex. 19, at 45-51.) Vision has properly been ordered to conduct a good faith search for the documents it agreed to produce and must now do so.

2. *Vision Has Unilaterally, And Improperly, Redacted Documents Prior To Production*

Vision unilaterally redacted pertinent and responsive information from its documents even though the Court has entered a valid protective order in this case and Vision has asserted,

1 and can assert, no valid privilege allowing it to redact this information. Despite repeated  
 2 requests for the basis for Vision's redactions, Vision has provided none. Indeed, Vision has  
 3 never produced a privilege log in this matter. Moreover, Vision's 30(b)(6) witnesses testified  
 4 that Vision has the non-redacted versions of the documents in its immediate possession and  
 5 control. (Meers Dep., Ex. 1, at 473-74.) Vision has removed or obscured a great deal of  
 6 pertinent information and in many cases left the Class with indecipherable bits and pieces of  
 7 information.  
 8

9 Courts have consistently held that it is not appropriate for parties to unilaterally redact  
 10 information from original documents without a recognized basis in privilege, which has been  
 11 appropriately logged. For example, in *Howell v. City of New York*, No. CV-06-6347  
 12 (ERK)(VVP), 2007 WL 2815738, at \*2 (E.D.N.Y. Sept. 25, 2007), the court held that "it is not  
 13 the practice of this court to permit parties to selectively excise from otherwise discoverable  
 14 documents those portions they deem not to be relevant. To do so would require a finding of  
 15 'good cause' based on a need 'to protect a party or person from annoyance, embarrassment,  
 16 oppressions, or undue burden or expense.'" Furthermore, the practice of unilateral redaction is  
 17 disfavored because:  
 18

19 The practice frequently gives rise to suspicion that relevant material harmful to  
 20 the producing party has been obscured. It also tends to make documents  
 21 confusing and difficult to use. All too often, the practice results in litigation of  
 22 collateral issues and in camera review of documents by the Court, with the result  
 23 that the time of both counsel and the Court is wasted. These drawbacks ordinarily  
 outweigh the minimal harm that may result from disclosure of some irrelevant  
 material.

24 *Meditronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-GV, 2002 WL 33003691, at  
 25 \*5 (W.D. Tenn. Jan 20, 2002) (quoting *In re Medeva Sec. Litig.*, 1995 U.S. Dist. LEXIS  
 26 21895, at \*8 (C.D. Cal. May 30, 1995)).  
 27

28 Here, Vision has redacted pertinent and relevant evidence without offering any  
 explanation. (Vision First Quarter Fixed Costs Invoice, attached as Ex. 20.) For

example, an examination of the document below reveals how Vision has redacted relevant and pertinent information from some of its invoices.<sup>5</sup>

**Vision Airlines**  
**Phase III Air Bridge**  
Enter Data in Yellow Blocks

Month of	January, 2007	February, 2007	March, 2007	
Program Billing	Vision Total	Vision Total	Vision Total	Total
Aircraft (2) Lease/Debt Service	\$	\$	\$	\$
Insurance - Hull and Liability Standard	\$	\$	\$	\$
Flight Deck Crew	\$	\$ 384.62	\$	\$
Flight Deck Crew Benefits	\$	\$ 88.46	\$	\$
Hazardous Duty Bonus	\$	\$ 120.19	\$	\$
Crew Training	\$	\$	\$	\$
Cabin Crew	\$	\$ 207.69	\$	\$
Cabin Crew Benefits	\$	\$ 47.77	\$	\$
Hazardous Duty Bonus	\$	\$ 80.13	\$	\$
General & Administration - Vision	\$	\$	\$	\$
G & A Vision Discount	\$	\$	\$	\$
Total Fixed Cost Per Hour	\$	\$	\$	\$
Total Weekly Fixed Cost	\$	\$	\$	\$

Vision's redactions are pervasive within the few McNeil phase documents produced to the Class. As evidenced below, Vision has redacted certain pertinent information from its invoices during the McNeil phase of the Air Bridge Contract. (See Exemplar of Vision redacted Phase IV invoice, attached as Ex. 21.) All of the black boxes on the document below are redactions Vision made to the invoices that it produced to the Class. (Meers Dep., Ex. 1, at 474.)

<sup>5</sup> Vision's redactions are entirely random and wholly inconsistent. Why Vision would redact the amounts for "hazardous duty bonus" for January and March, but leave them for February is utterly baffling and reflects the lack of any basis in privilege for these redactions.

13

## 7. VISION'S PRICE TAG

Item	Unit	Rate	Quantity	Amount
Flight Deck Crew		\$ 2,912,280.70		\$ 1,687,719.30
Hazardous Duty Bonus - Flight Crew		\$ 352,140.12		\$ 295,350.88
Cabin Crew		\$ 1,087,719.30		\$ 912,280.70
Hazardous Duty Bonus - Cabin Crew		\$ 190,350.88		\$ 169,649.12
Total Fixed Price				\$ 2,064,999.99

14

3. *Vision May Have Failed To Properly Preserve Relevant Documents*

As noted above, Vision's five 30(b)(6) representatives have all been unprepared for their roles as corporate representatives. They reviewed few, if any, documents and spent even less time, and in some instances no time, meeting with counsel prior to their depositions. This has made it exceedingly difficult for the Class to determine what responsive documents Vision has, and what efforts Vision has made to collect and produce those documents. One thing that has become more evident over time is that Vision may have destroyed or lost significant amounts of relevant documents. Vision should be made to account for those documents, and sanctioned if it cannot.

The inadequacy of Vision's production, and statements made by some of its witnesses about the destruction or loss of documents, raise serious concerns about spoliation. Topic twelve in the Class's Notice covers, "[l]aws, rules, regulations that govern Vision's retention or preservation of documents relating to its dealings with CSC, Capital Aviation, McNeil, or any branch, division, or agency of the United States government that relate to the Air Bridge or the Air Bridge Contract, and Vision's efforts to comply with such laws, rules, or regulations." The purpose of this topic was to help the Class identify what types of documents Vision was required to retain as a government subcontractor and what types of documents Vision should have produced to the Class – which, in large part, Vision has failed to do. Vision's contract with Capital Aviation stated that "invoice documentation shall be made available at any time from the date of this Agreement until three (3) years after 'final' payment hereunder." (Capital Aviation Contract, attached as Ex. 23 at 2.) Final payment was not made until sometime in 2009. Therefore, Vision should still have these documents available to produce to the Class. Despite the noticing of this topic for deposition, however, none of Vision's witnesses were able to testify knowledgably on this topic. (*See* Daggett Dep., Ex. 18, at 24); (Meers Dep., Ex. 1, at 281); (Acor Dep., Ex. 22, at 536.)



At the outset of this case, Class counsel sent a letter to Vision reminding it of its obligations to preserve relevant documents. (See Letter from David Buckner to Vision dated January 21, 2009, attached as Ex. 24.) Despite this, Vision seems to have taken its obligations less than seriously. For example, Acor testified that he reads and deletes his email, and did so with regard to e-mails relevant here, even though his company has been in litigation since at least 2008. (See Acor Dep., Ex. 22, at 596.) Another Vision 30(b)(6) witness testified that Vision has no document retention policy. (See Deposition of Thomas Dale Miller, attached as Ex. 25, at 68.)<sup>6</sup>

Finally, Vision claims that the Class is attempting to reopen discovery. Despite the irony of this statement, coming as it does from the party that refused to comply with its discovery obligations during the discovery period, it is simply not true. After the Magistrate Judge entered his Order on the Renewed Motion to Compel, the Class sent Vision a letter outlining some of the types of documents that it is aware of and which have not been produced, or which were produced by Vision in redacted form. The Class also noticed a Rule 30(b)(6) deposition for the day of calendar call in this matter, as all counsel will be in Las Vegas, for the limited purpose of exploring the steps that Vision has taken since the granting of the Renewed Motion to gather and produce responsive documents. (See Letter from David Buckner dated September 10, 2010 and 30(b)(6) Notice for September 29, 2010, attached as Composite Ex. 26.)

<sup>6</sup> In order to impose sanctions under Rule 37(b)(2)(A), there must be a violation of a Court Order compelling discovery, Fed. R. Civ. P. 37(b)(2)(A), and a showing that the violation was willful. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994). In *Chrysler Corp. v. Carey*, 186 F.3d 1016, 2021 (8th Cir. 1999), the court entered an order striking the defendants' answer after reviewing the evidence of "widespread abuse of the discovery process." During the course of discovery, the *Chrysler* court entered various orders compelling discovery from the Defendants, *id.* at 120 n.5., however defendants refused to turn over responsive documents, claiming that "[n]o such documents exist."<sup>6</sup> *Id.* at 1019. At trial, where Chrysler introduced forty-two letters and correspondence responsive to the discovery requests, the court reviewed the record as a whole and found the defendants engaged in systematic conduct that evidenced "blatant disregard of the Court's orders and the discovery rules." *Id.* at 1020. Likewise, in *Payne v. Exxon Corp.*, 121 F.3d 503- 505-06 (9th Cir. 1997), the Ninth Circuit upheld the lower court's order striking the plaintiff's complaint based on evidence demonstrating "the refusal of a plaintiff to comply with three separate orders wherein the record is full of evasion and dilatory tactics, and the discovery requested is relevant to the fact issue."

1 **IV. CONCLUSION**

2 The Magistrate Judge properly ordered Vision to comply with its discovery obligations.  
3 The Class respectfully requests that the Order be affirmed, and Vision instructed to complete its  
4 production as ordered. The company has had nine months to get its discovery house in order,  
5 and given the proximity of trial, no further delays should be permitted.  
6

7 Respectfully submitted,

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24 **CERTIFICATE OF SERVICE**

25 **I HEREBY CERTIFY** that a true copy of the foregoing has been served via the Court's  
26 CM/ECF system on September 15, 2010 on Harold P. Gewerter, Esq., 2705 Airport Drive, North  
27 Las Vegas, Nevada 89032.  
28

By: /s/ David M. Buckner  
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